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IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 405

J. S. GARLINGTON, et ux.,
Petitioners,
vs.
A. L. WASSON

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS.

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI

and

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI WITH BRIEF IN SUPPORT THEREOF.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS.

NOTE: All emphasis in this Petition for Rehearing and in the accompanying Supplement to Petition for Certiorari and Brief in Support Thereof is supplied.

PETITION FOR REHEARING.

To the Honorable Justices of the Supreme Court of the United States:

This petition for rehearing is filed by leave granted January 21, 1943.

Outline of the History of This Cause.

This matter originated by the filing of a farmer debtor petition, with schedules, in the United States District Court for the Northern District of Texas, Abilene Division, on July 26, 1939. R. 67 to 78.

On January 7, 1941, the respondent A. L. Wasson filed in the state District Court of Howard County, Texas, his petition for an order of possession and writ of ejectment against the said farmer debtors for an order declaring certain foreclosure proceedings against 2560 acres of farm real estate under a Deed of Trust from the farmer debtors to the respondent to be regular and valid. R. 6. This farm real estate had been scheduled in the farmer debtor proceeding. R. 70 and R. 74.

The petition of the respondent was granted by the judgment of the State Court. R. 22 and 23.

An appeal to the state Court of Civil Appeals was dismissed. R. 88. Motion for rehearing was overruled. R. 95.

Application to the Supreme Court of Texas for a writ of error was refused. R. 100. Motion for rehearing was overruled. R. 104.

Time to file a petition for certiorari in this court was extended to and including September 19, 1942. R. 104.

Petition for a writ of certiorari to the Supreme Court of Texas was filed September 19, 1942. R. 104. It was denied January 4, 1943. Time to file a petition for re-

hearing was extended to February 22, 1943. This petition for rehearing is filed within the extended period.

Why This Petition for Rehearing Is Necessary.

Throughout the federal and state court proceedings, in this particular cause, and others growing out of the farmer debtor proceeding, the only counsel for the petitioners was Olin M. Street, Esq., of Dallas, Texas, a member of the firm of Carlton, Martin and Street. No other member of the firm had any personal knowledge of the litigation. Even before the completion of the litigation in the state courts the imminence of the induction of Mr. Street into the military service distracted his attention from it. Before the record and petition for certiorari were prepared and filed Mr. Street entered the United States Army. The only member of the firm who is a member of this bar is M. C. Martin, Esq., and he was engaged full time in other matters which took him away from his office. He signed the petition for certiorari. Mr. Carlton, the remaining member of the firm, who had no knowledge of the case and no experience with procedure in this court, supervised the filing of the papers in this court. See affidavit of Mr. Carlton dated December 8, 1942, which was filed in this court in this cause.

The petition for certiorari was denied by this court on January 4, 1943, when the petitioners were seeking other counsel to represent them in this court.

The application for leave to file this petition for rehearing and its allowance followed.

The petitioners present herewith their revised petition for a writ of certiorari and their brief in support of it.

Wherefore they pray that their petition for rehearing be granted and that upon reconsideration their petition for certiorari may also be granted.

Lima, Ohio
February 6, 1943

J. S. Garlington and
Jennie L. Garlington, *Petitioners.*

Ross Carlton,
Dallas, Texas
Of Counsel.

By Elmer McClain, Lima, Ohio,
and William Lemke,
Fargo, North Dakota,
Their Counsel.

Verification.

United States of America
Northern District of Texas
County of Howard, ss:

J. S. Garlington and Jennie L. Garlington, being duly sworn, say they are the petitioners named in the foregoing petition for rehearing of their petition for certiorari, and that the statements made therein are true as they verily believe.

J. S. Garlington,

Jennie L. Garlington.

Sworn to before me and in my presence subscribed this ..... day of February 1943.

Notary
Seal

Notary Public.

Certificate of Counsel.

We certify that the foregoing petition for rehearing is filed in good faith and not for any purpose of delay.

ELMER MCCLAIN,
Counsel for the Petitioners.

Lima, Ohio
February 15, 1943

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 405

J. S. GARLINGTON, et ux.,
Petitioners,
vs.
A. L. WASSON

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS.

SUPPLEMENT

to

Petition for a Writ of Certiorari to the Supreme Court of the State of Texas.

(The brief in support of the petition for certiorari begins at page 15)

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

Summary Statement of the Matter Involved.

While the petitioners' farmer debtor proceeding was pending in the bankruptcy court the present respondent who was holder of a second mortgage, by deed of trust, on 2560 acres of the farmer debtors' land which had been scheduled in the farmer debtor proceeding proceeded to foreclose under a power of sale included in the mortgage. The trustee executed his deed to the mortgage holder. Farmer debtors' petition: R. 67 to 68. Schedules: R. 70, R. 74. Mortgage deed of trust: R. 48 to 53. Notice of trustee's sale: R. 57. Trustee's deed: R. 54 to 56.

The present respondent as mortgage holder then brought suit in the state District Court of Howard County, Texas, against the present petitioners for an order of possession, a writ of ejectment, an order validating the foreclosure procedure by power of sale, and an order clearing the title of the mortgagee as purchaser in foreclosure. R. 6 to 8.

The respondent in his petition in the state court alleged that his foreclosure by power of sale through his trustee was authorized by an order of the bankruptcy court in the farmer debtor proceeding. Petition in state court: R. 6 to 8. The order of the bankruptcy court relied upon was set forth as Exhibit A to said petition. R. 8 to 11.

The record shows that the foreclosure procedure under the power of sale was instituted in violation of Section 75 (n), (o), and (p) and also in violation of Rule 62 (a) of the Rules of Civil Procedure.

The state court gave judgment for the plaintiff. Judgment of state court: R. 22 to 24.

On appeal to the state Court of Civil Appeals of the State of Texas, the appeal was dismissed. R. 87. Motion for rehearing was overruled. R. 95. Application for writ of error was denied by the Supreme Court of Texas. R. 100. A motion for rehearing was overruled. R. 104. Time for filing petition for certiorari in this court was extended to September 19, 1942, and it was then filed. R. 104.

II.

The Basis of the Jurisdiction of This Court.

A federal question has been the sole issue in all the state courts.

The original suit brought by the respondent in the state District Court of Howard County, Texas, was grounded upon an alleged order of the bankruptcy court. R. 6. Exhibit A, at R. 8. The said alleged order of the bankruptcy court was based upon Section 75 of the Bankruptcy Act, U. S. C. Title 11, Section 203. The petitioners, as defendants in the state courts raised the federal question at their first appearance wherein they filed their Plea in Abatement and Motion to Quash. R. 2, especially paragraph 1 at R. 2. Also in their Answer, R. 17 to 21, especially paragraph 1 at R. 18, beginning at the top of the page. They put in evidence their farmer debtor petition and

schedules from the files of the bankruptcy court. Defendants' Exhibit D-1, R. 67 to 68. They showed that their farmer debtor proceeding was pending long after the alleged foreclosure by power of sale. (Date of foreclosure January 2, 1940, see Plaintiff's Exhibit 2, R. 54 to 56.) Testimony of Conciliation Commissioner Smith on May 17, 1941 (R. 24 fol. 44). R. 41 to 43. Defendants' Exhibit D-2 shows their farmer debtor proceeding in their case still pending on November 22, 1940. R. 79 to 80.

On appeal to the state Court of Civil Appeals the federal question is discussed at R. 92 to 94.

In the Supreme Court of Texas the federal question is discussed at R. 96 to 99. Also at R. 101 to 103.

The Supreme Court of the State of Texas is the court of last resort of that state and the said judgment is final judgment which presents a federal question.

The jurisdiction of this court is conferred by Section 237 of the Judicial Code; 28 U. S. C. 344.

The petitioners have complied with Section 8(a) of the Act of February 13, 1925; 28 U. S. C. 350. Time to file a petition for a writ of certiorari was extended to September 19, 1942, and the petition for certiorari was filed on that date. R. 104.

III.

The Questions Presented.

1.

Do the prohibitions in the farmer debtor provisions of Section 75 (n), (o), and (p), of the Bankruptcy Act, against mortgage foreclosures during the pendency of a

farmer debtor proceeding, apply to a foreclosure under a power of sale by trustee embodied in a mortgage deed of trust?

2.

May the foreclosure of a mortgage be instituted during the pendency of a farmer debtor proceeding under Section 75 of the Bankruptcy Act where the foreclosure is pursuant to a power of sale by trustee under the terms of a mortgage deed of trust?

3.

May the foreclosure of a mortgage be instituted during the pendency of a farmer debtor proceeding under Section 75 of the Bankruptcy Act where the prohibitions of Section 75 (n), (o), and (p), are disregarded?

4.

May the trustee, under a power of sale embodied in a mortgage deed of trust, proceed to foreclose the mortgage by authority of an unlawful order of the bankruptcy court in a farmer debtor proceeding which embraces the farmer debtor and the property involved in the foreclosure?

5.

When the mortgagor and the security named in a mortgage deed of trust have become subject to the exclusive jurisdiction of the bankruptcy court under the farmer debtor provisions of Section 75 of the Bankruptcy Act, may the trustee named in said mortgage deed of trust proceed under a power of sale therein to foreclose under said mortgage deed of trust when no effective authority to so proceed has been issued by the bankruptcy court?

6.

Assuming that a lawful order authorizing foreclosure of a mortgage has been entered by a bankruptcy court in a farmer debtor proceeding under Section 75 of the Bankruptcy Act, may the foreclosure so authorized be instituted before such order becomes effective?

7.

May an order of a bankruptcy court which is subject to appeal be put into execution before ten days from the entry thereof?

IV.

Reasons Relied Upon for Allowance of a Writ of Certiorari.

1.

The interpretation of a statute of the United States is involved, namely Section 75 (n), (o), and (p), of the Bankruptcy Act, 11 U. S. C. 203 (n), (o), and (p). That statute places the exclusive jurisdiction over the farmer debtor and his property in the bankruptcy court and provides that such exclusive jurisdiction may not be surrendered except by compliance with the terms prescribed therein.

2.

The interpretation of another statute of the United States is involved, namely 28 U. S. C. 874, and 880, and Rule 62 (a) of the Rules of Civil Procedure.

3.

There is involved an unlawful order of a United States District Court, as a court of bankruptcy, issued in violation of the mandate of the statute prescribed in Section 75 (o) and (p) of the Bankruptcy Act.

4.

There is involved an unlawful order of a United States District Court, as a court of bankruptcy, issued in violation of the mandate of the statute in Section 75 (n).

5.

The order of the state court attempted to validate an illegal title to real estate acquired under the guise of an unlawful order of a United States Court contrary to the Constitution of the United States, namely, Article VI thereof, and Amendment XIV thereto, and Article I, Section 8, clause 4 thereof.

6.

The order of the United States District Court as a court of bankruptcy, in purporting to authorize the foreclosure of property brought within its jurisdiction by the farmer debtors' petition and schedules in violation of Section 75 (n), (o), and (p), violated Amendment V to the Constiution.

7.

The order of the state court in presuming to validate a foreclosure proceeding instituted in violation of Section 75 (n), (o), and (p), of the Bankruptcy Act is in violation of Amendment XIV to the Constitution.

8.

The order of the United States District Court, upon which the respondent mortgage holder and purchaser in foreclosure relies, is in conflict with the decision of this court in *John Hancock* v. *Bartels*, 1939, 308 U. S. 180; *Gray* v. *Union*, 1939, 308 U. S. 523; *Morrison* v. *Federal*, 1939, 308 U. S. 524; *Kalb* v. *Feuerstein*, 1940, 308 U. S. 433; *Borchard* v. *California*, 1940, 310 U. S. 311; *Wright* v. *Union Central*, 311 U. S. 273; *Wright* v. *Logan*, 1942, 315 U. S.

139; *Mangus* v. *Miller*, 1942, ... U. S. ....; *Wragg* v. *Federal*, 1943, ... U. S. .....

Wherefore your petitioners pray, as heretofore, that a writ of certiorari duly issue to the Supreme Court of the State of Texas, to the end that the errors complained of may be corrected by this court.

Lima, Ohio
February 6, 1943.

ELMER MCCLAIN, Lima, Ohio,
WILLIAM LEMKE, Fargo, North Dakota,
Counsel for Petitioners.

ROSS CARLTON,
Dallas, Texas,
Of Counsel.